# STATE OF MICHIGAN

# COURT OF APPEALS

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| LAURENTIAN COMMONS CONDOMINIUM ASSOCIATION OF CO-OWNERS, INC., | UNPUBLISHED September 10, 2009 |
| Plaintiff-Appellee, | |
| v | No. 286496 Genesee Circuit Court |
| PHILIP L. DULMAGE, | LC No. 07-087462-CH |
| Defendant-Appellant. | |

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting a permanent injunction and judgment for plaintiff. The court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) after striking defendant's answer as a sanction for failure to respond to discovery in this action for enforcement of condominium bylaws. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant's stated issue challenges whether the trial court erred in determining that there was no genuine issue of material fact in deciding plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9). This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(9) is properly granted "[i]f the defenses asserted are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. . . ." *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000) (citations and internal quotations omitted). In *Enci v Jackson*, 173 Mich App 30; 433 NW2d 313 (1988), this Court concluded that the trial court properly granted summary disposition pursuant to MCR 2.116(C)(9) after having stricken the defendant's answer and affirmative defenses as a sanction for violations of the court's discovery order. Thus, it appears that so long as the striking of the documents was proper, the trial court properly granted summary disposition. Alternatively, even if MCR 2.116(C)(9) was inapplicable, the trial court could have properly entered a default judgment against defendant pursuant to MCR 2.313(B)(2)(c). Thus, the only issue is whether the trial court abused its discretion in striking defendants answer and affirmative defenses as a discovery sanction. *Enci*, *supra* at 33-34.

Defendant's primary excuse for not appearing at his deposition and not responding to the January 2008 requests for admission, production of documents, and interrogatories, and the

February 29, 2008, motion for sanctions was that he did not receive the pertinent documents in the mail. He claimed that he has had a persistent problem with mail not being delivered and submitted documentation indicating other mail was diverted as being undeliverable. His secondary excuse was that health conditions interfered with his ability to act diligently. He submitted notes from physicians to support his claim of physical and mental health issues. We agree with the trial court that, under the circumstances of this case, neither of these excuses constituted good cause.

The claimed difficulties with defendant's mail do not excuse defendant's inaction. Even assuming that defendant did not timely receive the deposition notice, the discovery requests, and the motion for sanctions, he must have been aware of these documents no later than March 20, 2008, when he filed his objection to the proposed order for sanctions for failure to provide discovery. Once defendant was aware of the discovery requests, he should have taken action to respond in an expeditious manner. Instead, he waited. Defendant asserted that on March 20, 2008, plaintiff's counsel promised to send him a copy of the discovery materials and then failed to do so. However, defendant does not indicate that he attempted to follow-up when nothing arrived. Instead, defendant again did nothing and then failed to appear at the April 7, 2008, hearing on his objections because he allegedly forgot when he scheduled it. He claimed that the clerk of the court told him that the hearing had been rescheduled for April 14, 2008, but there is no indication that defendant endeavored to find out whether an order was entered on that date. He asserted that he finally obtained a copy of the documents from the court on May 1, 2008, but it was not until June 16, 2008 that defendant submitted answers, along with his response to plaintiff's motion for summary disposition. There are certain cases where we might be willing to make allowances for defendants who are unfamiliar with the legal system and their deadlines. However, defendant was, at one time, a licensed attorney. He had more than a general understanding of discovery and the deadlines involved. Because defendant showed himself able to go to the court and obtain the information he lacked, we find the inconsistent mail no excuse for his continued delays, missed hearings, and long periods of inaction.

The claimed difficulties with defendant's health also do not excuse his failure to provide discovery. As evidenced by defendant's own actions, he was able to write correspondence, he understood the nature of the documents he was receiving, and he was physically able to go places such as the courthouse. Indeed, the letter from the psychiatrist was obtained in March 2008 and indicated that although defendant had been dealing with significant depression problems, at the time of the writing of the letter, "things seems to be stabilizing." If defendant felt unable to handle the case on his own, he was aware he could seek legal representation.

Under the circumstances, we cannot say that the trial court's decision to strike defendants answer and affirmative defenses was an abuse of discretion, i.e., a decision outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Accordingly, the trial court's judgment against defendant was proper, whether under MCR 2.116(C)(9) or MCR 2.313(B)(2)(c).

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro